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366-308—69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 589

RAYMOND CHARLES CURIALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1969. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to September 19, 1969, and, on September 15, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioner's written consent to the search of his business premises, given after due warning of his rights, was voluntary.

2. Whether, after petitioner had testified as to his ignorance of the presence on his premises of certain stolen property, it was a violation of petitioner's right against self-incrimination to instruct the jury that knowledge by petitioner of the stolen nature of the property could be inferred if the jury believed that his possession of such property was "not satisfactorily explained."

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of an indictment [1] which charged that he received and concealed government property, $300,000 in United States dimes, which had been stolen from an interstate shipment, in violation of 18 U.S.C. 641, 659 and 2315. On October 25, 1968, he was sentenced to concurrent terms of five years' imprisonment on each count, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (7 R. 10–11).[2]

1. The undisputed evidence showed that on May 29, 1968, a Railway Express Agency truck, loaded with

[1] These were Counts 1, 2 and 4. Count 3 was dismissed by the court during the trial; other Counts were severed before trial.

[2] "R." preceded by the volume number refers to the seven volume record on file with the Clerk of this Court. The first six volumes are consecutively paginated and contain a transcript of the pretrial motion to suppress (1 R. 1–102, 2 R. 103–168), and the trial transcript. Volume 7 R. deals with post-trial matters.

$500,000 in newly minted dimes, was hijacked at Fort Lee, New Jersey, by three unidentified men (2 R. 204–211). The next day the truck was found near Patchogue, New York, approximately seventy-five miles from Fort Lee, abandoned and empty of its cargo (3 R. 251, 257).

Petitioner operated a garment manufacturing plant in Patchogue. His factory was housed in a former garage (4 R. 394) that had overhead doors sufficiently large to accommodate the stolen tractor-trailer (4 R. 395; 3 R. 249–258). On May 30–31, 1968, two police officers in Patchogue noticed, both outside and inside petitioner's business premises, tire markings of distinctive design. One of the officers, who had viewed the recovered hijacked truck, believed the tire markings were similar to the markings that would be made by the tires of the hijacked truck (4 R. 394–397, 402–404). On June 6, as a result of petitioner's execution of a consent to search form,[3] agents of the F.B.I. searched petitioner's factory. In the rear room, the agents found a raised platform, approximately two feet high. Concealed within the platform were $304,000 of the stolen dimes (3 R. 284–286, 291), packed in 304 canvas bags, each marked "$1,000 dimes, U.S. Mint 1967" (1 R. 83).

2. Before trial, petitioner moved to suppress the dimes seized at his business premises. At the hearing, the evidence showed that on June 6, 1968, the F.B.I. received a tip that the stolen dimes were stored in petitioner's factory, and thereupon commenced a sur-

[3] The events leading up to petitioner's signing of the form are discussed *infra* pp. 3–6.

veillance of petitioner (1 R. 121). Petitioner noticed he was being followed and indicated to the agents that he knew he was under surveillance (1 R. 20; see 3 R. 270–271). The F.B.I. agents ascertained from an assistant United States Attorney that the government's information was insufficient to warrant a request for a search warrant (1 R. 98, 106–107). The agents were instructed to ask petitioner if he was amenable to an interview, in the hope that such interview would result in petitioner granting them the right to search (1 R. 13, 22–25, 107); if petitioner refused, the agents were to terminate the surveillance (1 R. 13, 22, 24). At the driveway of petitioner's home, the agents approached him and asked that he accompany them to a local police station. They told him that they believed he had information which would be of assistance in an investigation that the F.B.I. was conducting (1 R. 9, 27, 30). Petitioner agreed to go with them and entered the agents' vehicle. He was not handcuffed and was seated alone in the rear of the vehicle.[4] Petitioner's wife was present at the time and she was told by an agent that petitioner had been asked and had agreed to go to the police station in order to aid in an investigation (1 R. 9). Mrs. Curiale replied that she was not concerned since petitioner had never been in any trouble (1 R. 33–35). The agents believed that they had no authority to arrest petitioner (1 R. 49–50),

[4] The agents testified that handcuffs and close custody are employed only in arrest cases (1 R. 9, 61–62).

and said nothing to petitioner about an arrest (1 R. 9–10.[5]

Upon arrival at the Patchogue police station, petitioner was interviewed by Agent Ahern, who explained to petitioner his right to silence and counsel. Petitioner stated he understood his rights against self-incrimination, and then read and signed a form which contained these warnings (1 R. 66–69). At that time petitioner was twice told that he was not under arrest, and that he was free to leave; in response, he nodded affirmatively (1 R. 70–71, 99). Agent Ahern then told petitioner that the F.B.I. was interested in his Patchogue business premises; that they had information that "stolen merchandise was stored there." Petitioner replied that his company controlled the premises but that he had recently rented the rear room to an individual whose name he did not then recall (1 R. 71–72, 92). Petitioner added that he had retained the right to enter this rear room and store his own merchandise there (1 R. 72). Upon being told that the F.B.I. wanted to make a search, petitioner was handed a consent to search form. After reading the form, peti-

[5] The record does not support petitioner's claim that he was told at his home that he was under arrest and that there can be "no dispute" as to this (Pet. 5, 6–7, 11). Petitioner's certainty is based on an incomplete answer of a testifying agent (see Pet. 5), which defense counsel interrupted with an objection, and which objection was sustained by the court. The record shows that immediately after counsel's objection, the prosecutor reworded his question and the agent replied that he did not tell petitioner he was under arrest (1 R. 9–10).

tioner stated that if he did not sign the form the agent would get a search warrant. The agent answered that he did not want petitioner to sign on that basis. He told him, "If you are going to sign it, do it voluntarily." Petitioner then "just looked and signed it" (1. R. 73). Before signing it, petitioner had read the form and indicated to Agent Ahern that he understood it (1 R. 74).[6]

Petitioner also agreed to accompany the agents who conducted the search. After petitioner unlocked the premises, the agents found the 304 bags of stolen dimes within a newly constructed platform, ostensibly designed to keep stored textile piece goods off the floor (1 R. 75–77, 82). After the bags were found, and following some later conversation between petitioner and Agent Ahern, petitioner was arrested and handcuffed (1 R. 83–84).

Aside from the testimony of Mrs. Curiale, the only defense evidence on the motion to suppress was the testimony of a defense psychiatrist (2 R. 138–143). The psychiatrist, who had interviewed petitioner for twenty minutes, testified that any person subject to

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[6] Petitioner contends that two inquiries were made by him concerning a search warrant and that Agent Ahern misled him by his silence on the second occasion (Pet. 8–9). The record indicates, however, that petitioner made no inquiries, but only the one statement as to the agent obtaining a search warrant. Agent Ahern, after identifying the exhibit signed, repeated and amplified his prior testimony as to petitioner's statement and immediate signing thereafter (1 R. 73–74). The cross-examination indicated the statement by petitioner was only made once (2 R. 114). The declarative nature of the statement is made clear by Agent Ahern's testimony, that petitioner had said: "If I don't sign it, you will get a search warrant anyway" (4 R. 439).

such close surveillance and subsequent questioning at police headquarters would feel duress; that he believed petitioner was under considerable strain at that time; and that there was doubt in his mind that petitioner "knew really what he was signing" when he signed the consent to search form (Pet. App. 7a).

Based on this evidence, the district court ruled that petitioner signed the waiver of the right against self-incrimination and the consent to search knowingly and understandingly. The court stated:

> I believe that this defendant knew exactly what he was doing. He took a gamble and he hoped that the search would reveal nothing. The coins were well hidden.
>
> He gambled and he lost; that is all that amounts to [2 R. 168].

3. In testifying at trial petitioner stated that on May 27, 1968, an unknown man came to his business establishment and identified himself as a Mr. Salb, a dress manufacturer from Pennsylvania. He stated that Salb wanted to store some piece goods at a location closer to New York than his Pennsylvania location and therefore rented the back room of petitioner's factory. Petitioner gave him a receipt for the rental and security deposit, and a set of keys. Subsequently, Salb called and stated he wanted to build a platform for his piece goods and he sent someone named "Joe" to do so. (4 R. 485–486, 493).[7] Salb permitted peti-

[7] The government evidence showed that it was petitioner who planned to erect the platform. In late May, petitioner told a garment manufacturer, for whom he did contract sewing of garments, that he was going to construct a platform in the rear room where petitioner stored the manufacturer's piece goods (4 R. 410–413).

tioner to use the rear area for his own storage purposes, until Salb's piece goods arrived (4 R. 494). Petitioner also testified that he had signed the consent to search form "because I figured I had nothing to hide in there" (4 R. 489).

In instructing the jury, the court, after defining the various types of possession (6 R. 572–574) stated:

> What is the significance of possession? If you find, beyond a reasonable doubt, that the defendant had possession of the coins and if you find that the coins were recently stolen, then if such possession is not satisfactorily explained, it is a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen [6 R. 574].

While petitioner had originally objected to the instruction on another ground (6 R. 550), he made no objection at trial that the reference to an unsatisfactory explanation was violative of petitioner's right against self-incrimination (see 6 R. 597; see also 7 R. 2, 4).

ARGUMENT

1. The essence of petitioner's argument (Pet. 4–13) is that his signing of the consent to search form was involuntary in the context of the events which preceded it—*i.e.* the surveillance, his alleged illegal custody and transportation to police headquarters and the questioning in the coercive atmosphere of the police station. This, however, was a factual question which was decided against him by both courts below

(Pet. App. 7a, 2 R. 168).[5] There is no reason for this Court to grant plenary review of this factual determination. See *United States* v. *Mitchell*, 322 U.S. 65, 70; *Drummond* v. *United States*, 350 F. 2d 983, 988 (C.A. 8), certiorari denied *sub nom. Castaldi* v. *United States*, 384 U.S. 944; *Evans* v. *United States*, 382 F. 2d 739, 741 (C.A. 9); *Gorman* v. *United States*, 380 F. 2d 158, 163 (C.A. 1); *United States* v. *Vickers*, 387 F. 2d 703 (C.A. 4), certiorari denied, 392 U.S. 912.

The evidence shows that, before any reference at police headquarters to the consent to search form, the agent gave petitioner full warnings as to his right to silence and to counsel and twice advised petitioner that he was free to leave. Petitioner did not avail himself of that opportunity. Moreover, when the agent thereafter presented him with the consent to search form, it was made perfectly clear that he only wanted petitioner to sign it if it was his voluntary choice to do so. Thus even if it be assumed *arguendo* that petitioner was in custody when he was driven to police headquarters—although it is our position, as it was that of the courts below that he voluntarily cooperated with the F.B.I. in accompanying them to headquarters, see *Hicks* v. *United States*, 382 F. 2d 158, 161 (C.A.D.C.)—any coercive atmosphere was dissipated by the events which followed. These events made clear to petitioner that he could leave any time he chose and

[5] Indeed, defense counsel at trial took the alternative position that the search was voluntary in order to support the claim that petitioner did not know the dimes were in his warehouse. See 4 R. 434–438, 489; 5 R. 513.

that he was fully advised of his constitutional rights. Cf. *Wong Sun* v. *United States*, 371 U.S. 471, 491.[9]

2. Petitioner attacks the court's instructions that in the absence of a satisfactory explanation, the jury could infer knowledge of the stolen character of the property possessed from the fact that the goods were recently stolen and that they were in defendant's possession (See Pet. 13–14). Petitioner contends that such an instruction was an infringement of his right to silence in contravention of *Miranda* v. *Arizona*, 384 U.S. 436, 468, n. 37 (Pet. 14–15). That decision, however, has nothing to do with this aspect of petitioner's case. The footnote in *Miranda* relied upon reads:

> * * * it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not * * * use at trial the fact that he stood mute or claimed his privilege in the face of accusation. * * *

---

[9] *Bumper* v. *North Carolina*, 391 U.S. 543, upon which petitioner in part relies (Pet. 9, 11), is inapposite, because Agent Ahern, unlike the police officer in *Bumper*, never claimed he had a search warrant. On the contrary, he told petitioner that if he signed the consent form it had to be on a voluntary basis. *Orozco* v. *Texas*, 394 U.S. 324, is also not applicable (see Pet. 12), because in that case there was a failure to give a warning as to testimonial rights before questioning commenced. In the present case, Agent Ahern gave such a warning at the outset of the interview; moreover, petitioner made no incriminating statements prior to such warnings.

Neither the instruction referred to above nor any other aspect of the trial in any way ran foul of this dictum of the *Miranda* case. The fact that petitioner had claimed his privilege when interviewed by the F.B.I. was ruled inadmissible by the trial court, in a hearing outside of the presence of the jury (see 4 R. 343–348; 2 R. 170). Moreover, petitioner testified in his own defense at trial, so that there is no basis for any claim that the instruction was a disguised comment on the defendant's failure to testify. In fact, the instruction complained of merely gave permission to the jury to draw a reasonable inference from all the evidence, and in doing so to consider petitioner's explanation of the possession of the dimes. This instruction was in accord with the settled precedents. See *Wilson* v. *United States*, 162 U.S. 613, 619; *Rugendorf* v. *United States*, 376 U.S. 528, 536–537. See also, *Herman* v. *United States*, 289 F. 2d 362, 367 (C.A. 5), certiorari denied, 368 U.S. 897; *Blunt* v. *United States*, 404 F. 2d 1283 (C.A. D.C.).[10]

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[10] While petitioner contends that *Young* v. *State of Florida*, 203 So. 2d 650, is strongly supportive, with only a minor "truly significant" distinction, that case, in fact, is totally inapposite. In *Young*, the jury had had presented to it evidence that the defendant, upon his apprehension, had declined to give a statement. Moreover, after referring to the inference which might arise from unexplained possession, the trial court in *Young* went on to define this explanation of possession as that given by a defendant when he is first under a duty to speak, after the recently stolen property is discovered in his possession (203 So. 2d at 651). Petitioner's jury was never told he was under any such duty to speak or explain.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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OCTOBER 1969.